No. 14,190

IN THE

United States Court of Appeals

For the Ninth Circuit

SUPERIOR SAND AND GRAVEL MINING CO., INC., a corporation,

Appellant,

vs.

TERRITORY OF ALASKA,

Appellee,

and

VERNON C. SCHUBERT, DOROTHY SCHUBERT, CLARENCE D. SMITH, JR., LILLIAN E. SMITH, EUGENE E. SAXTON, DOROTHY M. SAXTON, ELLSWORTH E. SAXTON and GRACE D. SAXTON, Co-Partners Doing Business as the Northern Construction Association, and ELLSWORTH E. SAXTON, as Agent for Said Association,

Appellants,

vs.

TERRITORY OF ALASKA,

Appellee.

Appeal from the District Court of the Territory of Alaska, Third Division.

BRIEF OF APPELLANTS SCHUBERT, ET AL., DOING BUSINESS AS THE NORTHERN CONSTRUCTION ASSOCIATION, AND ELLSWORTH E. SAXTON, AS AGENT FOR SAID ASSOCIATION.

E. L. ARNELL,
202 Turnagain Arms, Anchorage, Alaska,
VERNE O. MARTIN,
Suite 3, 408 D Street, Anchorage, Alaska,
Attorneys for Appellants, Northern Construction Association and Ellsworth E. Saxton, Agent.

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I. JURISDICTIONAL STATEMENT.

The jurisdiction of the District Court for the Territory of Alaska was invoked under the Act of March

3, 1952, c. 462, 43 Stat. 1144, 1145, being 30 U.S.C.A., Sections 29 and 30; and the Act of June 7, 1910, c. 265, 36 Stat. 459, being 48 U.S.C.A., Section 386 and 48 U.S.C.A., Section 101. Jurisdiction of the Court of Appeals rests on the Federal Judicial Code and the Federal Rules of Civil Procedure.

II. STATEMENT OF THE CASE.

The land involved is Section 16, Township 13 North, Range 3 West, Seward Meridian, Anchorage Precinct, Third Judicial Division, Territory of Alaska. It contains valuable deposits of sand and gravel (R. 33).

The Act of March 4, 1915, 38 Stat. 1214, 48 U.S.C.A. Section 353, reserved Sections 16 and 36 in each township in Alaska, not known to be mineral in character at the time of survey, from sale or settlement for the support of the schools, and gave the Territory of Alaska the right to lease such sections.

The Act of August 7, 1939, 53 Stat. 1243, amended the 1915 Act to authorize, among other things, the disposition of school sections under the mining and mineral leasing laws of the United States, upon conditions enumerated in the statute.

Late in 1950, the predecessors of Superior Sand and Gravel Mining Company, Inc., Appellant (R.9) and Schubert, *et al.*, Appellants (R.5 and R.14), and Anchorage Sand and Gravel Company, Inc., (R.4) located placer mining claims on this school section. At

that time, portions of the surface of the section were under lease to others (R.53) by the Territory of Alaska. Also, early in 1950, Anchorage Sand and Gravel Company, Inc., contracted with the United States for the removal of gravel from a portion of the section, under the Materials Act (Act of July 31, 1947, 61 Stat. 681, 43 U.S.C.A. Sec. 1185, *et seq.*) (R.4).

In 1952, Appellants Schubert, *et al.,* applied for patent under the placer mining laws (R.6 and R.15). Superior Sand and Gravel Mining Co., Inc., Appellant (R.16), and Anchorage Sand and Gravel Company, Inc., (R.6), filed adverse claims in the Land Office and commenced these proceedings (R.3 and R.8), under 30 U.S.C.A. Section 30 and 48 U.S.C.A. Section 386, to determine the rights of the adverse mineral claimants. The Territory of Alaska, Appellee, named defendant in each of the actions, moved to consolidate the actions (R.27). This motion was granted (R.30). The Territory of Alaska also moved to dismiss the complaints (R.29). After argument, the Trial Court entered its opinion (R.32), and its Order (R. 40), dismissing the complaints with prejudice. This appeal followed.

III. SPECIFICATION OF ERRORS.

The Trial Court erred as a matter of law in dismissing the complaints herein, for the following reasons:

1. Sand and gravel are minerals, subject to placer location under the mining laws of the United States.

2.a Under the mining laws of the United States a valuable discovery may validly be made of sand and gravel found on the surface.

2.b Whether any specific deposit of sand and gravel constitutes such a valuable discovery which will make the lands in question mineral in character, so as to give a locator a preference right over agricultural claimants, is solely for the determination of the Land Department of the United States and not for the Court in the type of proceeding here involved.

3. School lands in Alaska were subject to disposition under the mining laws of the United States during 1950, the time of the locations in question.

The jurisdictional portion (para. 2b) of Specification of Error Number Two and all of Specification of Error Number Three, although extensively argued orally and by written briefs, were disposed of by the Trial Court in its opinion as follows (R.38):

> "The questions argued on behalf of Northern Construction Association and the Superior Sand and Gravel Mining Co., Inc., in opposition to the motion to dismiss, are either not presented by the record or are not involved and, hence, do not merit extended discussion."

IV. ARGUMENTS AND AUTHORITIES.

FIRST ARGUMENT.

SAND AND GRAVEL ARE MINERALS, SUBJECT TO PLACER LOCATION UNDER THE MINING LAWS OF THE UNITED STATES.

The mining laws of the United States do not contain a definition of the term "mineral" as that word is used with respect to the discovery of mineral deposits, the location of mining claims, and the purchase of mineral land by mining claimants. Accordingly, since early times, the definition of the term "mineral" has become the subject-matter of interpretation both by the courts and by those executive departments of the government which are charged with the disposition of mineral lands under the mining laws. The Trial Court, in its opinion (R. 35), sets forth one of the earliest interpretations given to the word "mineral" by the Land Department, issued within a year after the enactment of the mining law of 1872, and which is quoted in Lindley on Mines, (3rd ed.), 163, as follows:

> "In the sense in which the term 'mineral' was used by Congress, it seems difficult to find a definition that will embrace what mineralogists agree should be included. * * * From a careful examination of the matter, the conclusion I reach as to what constitutes a valuable mineral deposit is this: That whatever is recognized as a mineral by the standard authorities on the subject, where the same is found in quantities and quality to render the land sought to be patented more valuable on this account than for the purpose of agriculture, should be treated by the office

> as coming within the purview of the Mining Act of May 10, 1872."

This rule was followed consistently in succeeding years and was embodied in a formal decision of the Land Department in *Pacific Coast Marble Co. v. Northern Pacific R.R. Co.,* 25 L.D. 233. However, by 1910 the Land Department began to except from this general rule such non-metallic substances as clay, sand and gravel.

Zimmerman v. Brunson (1910) 39 L.D. 310.

That same year an opposite conclusion was reached by the only American court of last resort to rule on the precise question of whether sand and gravel are "minerals" under the United States mining laws, when the highest court of the State of Oregon decided the case of *Loney v. Scott,* (1910), 112 P. 172.

This divergence was recognized, and the position of the Land Department criticized, by the standard authorities on the law of mining. Thus it is stated in 2 Lindley on Mines (3rd ed.), 424, as follows:

> "It is not difficult to account for this divergence of opinion. The courts follow a consistent uniformly recognized principle which establishes the test of profitable marketability. The Land Department follows this principle as a general rule, but disregards it in the case of the commonplace substances such as ordinary clay, sand and gravel. We submit deferentially that the commonplace quality of a substance is not a sufficient warrant for departing from the general rule. However, as the Land Department is the

> only tribunal which has the power to determine the character of land, it has the undoubted privilege of making exceptions to general rules and the courts cannot interfere with the exercise of this prerogative."
>
> *loc. cit.,* at p. 996

During the two decades which followed the Land Department's decision in *Zimmerman v. Brunson, (supra),* there followed an accumulation of economic and scientific data by that Department concerning the character of sand and gravel which, in 1929, led to a revaluation and to the ultimate reversal of the Department's previous policy of thus departing from the general rule enunciated by the courts. The new policy found its expression in the case of *Layman v. Ellis,* (1929), 52 L.D. 714.

In that case, Assistant Secretary Edwards, speaking for the Department, carefully reexamined the reasoning followed in the *Zimmerman* case, *(supra).* The decision then recites, at page 718, the data available to the Department at that time concerning sand and gravel, in the form of publications of the Geological Survey, entitled "Mineral Resources of the United States". It states that in these publications gravel and sand have uniformly been classed as a mineral resource and that they are also included in the list of the useful minerals and mineral supplies published by the United States Geological Survey. From this as well as from collected economic data pertaining to the volume, value, and applications

of sand and gravel production, the decision proceeds to conclude that "there can be no question that gravel deposits are definitely classified as a mineral product in trade and commerce and have a pronounced and widespread economic value because of the demand therefor in trade, manufacture, or in the mechanical arts." *Loc. cit.,* at p. 718.

The decision then recites the fact that in the *Zimmerman* case, *(supra),* the rule first enunciated in the *Pacific Coast Marble Co.* case, *(supra),* was quoted, but that "it was nevertheless attempted to take the deposit under consideration from under the rule, *first,* because the standard authorities have failed to classify sand and gravel as minerals, and *second,* because the deposit had no special property or characteristic giving it special value, and *third,* its chief value arose from industrial conditions peculiar to the locality where the deposit was found." *Ibid.,* at p. 719.

The decision in the *Layman* case, *(supra),* then goes into an extended examination of the standard authorities, which leads to the conclusion that these authorities *do* recognize gravel and sand as being mineral. It also considers and rejects the finding of the *Zimmerman* case, *(supra),* that gravel has no special properties or characteristics giving it special value. *Id.,* at p. 720. It goes on to say that:

> "As to the third ground for exclusion in the *Zimmerman* case, it has not been shown that the gravel deposits in this case derived their value from the proximity between place of production

> and use, and as heretofore indicated gravel is generally recognized as having special characteristics that render it valuable generally in the mechanical arts. The conclusion, hardly justified when the decision in the *Zimmerman* case was rendered, that the value shown was one arisrising chiefly from exceptional and peculiar conditions in the locality where the deposit in question was found, is not warranted under present conditions." *Id.,* at p. 720.

The decision goes on to point out that other Departments of the Federal government, such as the Treasury Department, have recognized gravel as a mineral and that the Land Department itself, in applying the rule of the *Pacific Coast Marble Co.* case, *(supra),* has recognized similar commonplace non-metallic substances, (such as volcanic ash, trap rock suitable for railroad ballast, amphibole schist usable as a building material, fractured granite suitable for embankments and as road material, etc.), as "minerals" which would make the lands in which they occurred enterable under the mining laws (citing cases).

Id., at p. 721.

The decision then concludes:

> "It seems apparent in the *Zimmerman* case and cases based on the same reasoning that the rule in the *Pacific Coast Marble Co.* case was not followed, but disregarded on unsubstantial grounds. It has been vigorously criticized by leading text writers on the mining law. (See Lindley on Mines, Section 424; Snyder on Mines, Section 124.) There is no logical reason in view

> of the latest expressions of the Department why, in the administration of the Federal mining laws, any discrimination should be made between gravel and stones of other kinds, which are used for practically the same or similar purposes, where the former as well as the latter can be extracted, removed and marketed at a profit. The rule in *Zimmerman v. Brunson* will therefore no longer be followed but is overruled."
>
> *loc. cit.,* at p. 721.

We have thus quoted at length from the *Layman* case because it represents the guiding precedent from which the Federal Government has never since departed. In this holding the Land Department reconciled its rule with that of the courts, whose decisions it cites with approval, by referring to the cases of *Northern Pacific Railway Co. v. Soderberg,* (1903), 188 U.S. 526, 534, and *Loney v. Scott,* (Ore. 1910), 112 P. 172.* In the *Soderberg* case, *(supra),* it was held that the overwhelming weight of authority was to the effect that mineral lands include not merely metalliferous minerals, but "all such as are chiefly valuable for their deposits of a mineral character which are useful in the arts or valuable for purposes of manufacture." In *Loney v. Scott, (supra),* the Supreme Court of Oregon held that building sand worth 50 cents per cubic yard, and marketable in large quantities, as shown by the Director of the Geological Survey in his reports of mineral resources, was mineral land and subject to location under the

*Also, *Webb v. American Asphaltum Co.,* (1907), 157 Fed. 203.

placer mining laws and that a patent issued to a railroad company under its place land grant carried no title to such deposits then known to be embraced in a placer mining claim.

As was alluded to above, the universal rule thus reestablished in *Layman v. Ellis, (supra),* has since been consistently followed by the Land Department without further exceptions.

See: Opinion of Acting Solicitor Fahy, approved by the Asst. Secretary of the Interior, 54 L.D. 294.

United States v. Barngrover (1954) 57 L.D. 533.

In the case last cited the Department stated its present rule as follows:

> "Consequently under the rule in the *Layman* case and also under court decisions, it appears that any substance found in nature, having a sufficient value separate from its situs as part of the earth, to be mined, quarried or dug for its own sake or its own specific uses is locatable and enterable under the mining laws."
>
> *loc. cit.,* at p. 534.

The learned Trial Judge in his opinion (R. 36) attempted to dispose of *Layman v. Ellis, (supra),* by first stating that it was "perhaps" influenced by *Loney v. Scott, (supra)*, and then essayed to discredit the latter case by stating that "it may perhaps be accounted for by the fact that that Court at Page 175 mistook a statement of the theory of one of the

parties in *Northern Pacific Ry. Co. v. Soderberg,* at 188 U.S. 534, for the opinion of the Supreme Court." However, a careful reading of the reported opinions in both these cited cases fails to substantiate this statement on the part of the Court below. Thus, in *Loney v. Scott, (supra),* the Supreme Court of Oregon, in an opinion by Judge Eakin, states as follows:

> "The question arises whether building sand is a mineral, within the mineral laws of the United States. * * * In Northern Pac. Ry. Co. v. Soderberg, 188 U.S. 526, 534 * * * the Court, in discussing whether granite comes within the term, 'mineral deposit' say: 'The words, "valuable mineral deposit" * * * should be construed as including all land chiefly valuable for other than agricultural purposes and particularly as including non-metallic substances [naming a list, and continuing]. We do not deem it necessary to attempt an exact definition of the words "mineral lands" as used in the Act of July 2, 1864 * * *. With our present light upon the subject it might be difficult to do so. * * * Indeed, we are of the opinion that this legislation consists with, rather than opposes, the overwhelming weight of authority to the effect that mineral lands include, not merely metalliferous lands, but all such as are chiefly valuable for their deposits of a mineral character which are useful in the arts or valuable for purposes of manufacture.' "

The Oregon court concludes that: "This definition seems broad enough to include building sand, and we are of the opinion that land more valuable for the building sand it contains than for agriculture is sub-

ject to placer location, and is mineral within the meaning of the United States mining statute."

loc. cit., at p. 175.

Turning next to the reported decision in the case of *Northern Pacific Railway Co. v. Soderberg, (supra)*, we find in Volume 188 of the United States Reports, at page 528, the commencement of an opinion by Mr. Justice Brown, which continues through page 537 of the volume referred to. On page 534 we find the following language, which unquestionably appears to be the language used by the Court in its opinion and forms the basis of its decision, and is clearly not (as the learned Trial Judge seems to assume for reasons which are not readily apparent) merely "a statement of the theory of one of the parties" (R. 36):

> "The rulings of the Land Department, to which we are to look for the contemporaneous construction of these statutes, have been subject to very little fluctuation, and almost uniformly, particularly of late years, have lent strong support to the theory of the patentee, that the words 'valuable minerals deposit' should be construed as including all lands chiefly valuable for other than agricultural purposes, and particularly as including non-metallic substances, among which are held to be alum, asphaltum, borax, guano, diamonds, gypsum, resin, marble, mica, slate, amber, petroleum, limestone, building stone and coal. The cases are far too numerous for citation, and there is practically no conflict in them.

> The decisions of the state courts have also favored the same interpretation. * * * The rulings of the English courts have, with a possible exception in some earlier cases, adopted the construction that valuable stone passed under the definition of minerals. * * *
>
> We do not deem it necessary to attempt an exact definition of the words 'mineral lands' as used in the Act of July 2, 1864. With our present light upon the subject it might be difficult to do so. It is sufficient to say that we see nothing in that act or in the legislation of Congress up to the time this road was definitely located [1884], which can be construed as putting a different definition upon these words from that generally accepted by the text writers upon the subject. Indeed we are of the opinion that this legislation consists with, rather than opposes, the overwhelming weight of authority to the effect that mineral lands include not merely metalliferous lands, but all such as are chiefly valuable for their deposits of a mineral character, which are useful in the arts or valuable for purposes of manufacture."
>
> *loc. cit.,* at pp. 534-537.

The foregoing statement, with its passing reference to the theory of the patentee, *which it approves and adopts,* certainly lends full support to the assumption of the Oregon Court that the highest court of the United States has given its sanction to a broader definition of the term "mineral" than was contended for by the appellants in *Loney v. Scott, (supra),* and therefore the deprecatory characterization of these

well reasoned precedents by the learned Trial Judge in his opinion (R. 36) appears to be unwarranted.

At the present time American judicial decisions, administrative determinations, and the view of the leading text writers are in harmony with respect to the uniform holding that sand and gravel are considered "minerals" within the meaning of the mining laws of the United States. Insofar as the Land Department is concerned, this position has been followed without deviation since the *Layman* case was decided over a quarter of a century ago. Obviously, if Congress had disagreed with this administrative determination, it could and would have enacted corrective legislation. This view is supported by the fact that in another instance, when the Land Office decided that building stone was too common to be classified as a mineral, Congress promptly enacted the statute set forth in 30 U.S.C.A., Section 161, which expressly extends the general placer mining laws to building stone, thus reversing the position of the executive department. Moreover, Congress has thus indicated a consistent policy of extending the mining laws to commercially valuable deposits of materials which not necessarily fit into the narrow definition of "minerals" given to them by some of the older text writers and decisions. At the same time, Congress has acquiesced for over 25 years in an administrative policy including within the terminology of the mining laws sand and gravel, the substances with which we are here concerned.

Finally, and we believe conclusively, this contemporaneous construction of the mining laws by the Land Department to which the courts were exhorted to look by the Supreme Court of the United States in the *Soderberg* case *(loc. cit.,* at p. 534), has been specifically reaffirmed by an enactment *in pari materia,* contained in the Federal statute known as the Act of July 31, 1947, 61 Stat. 681, 43 U.S.C.A., Secs. 1185, *et seq.,* commonly referred to as the "Materials Act". By this enactment the legislative branch of the United States Government specifically authorized the disposal of certain enumerated materials, including sand and gravel, where such disposal of these materials is "not otherwise expressly authorized by law, including the United States mining laws."

The learned Trial Judge in his opinion indeed makes reference to this statute (R. 37) but discovers therein support for the view that sand and gravel were not contemplated by the Congress as constituting minerals. In reaching its conclusion, the Court below reasoned as follows: "(By the Materials Act) Congress authorized the disposition of sand, gravel, stone and clay from the public lands. Since this act bears a close analogy to the mineral lands leasing act [Act of February 25, 1920, 41 Stat. 437], it would appear to follow that sand and gravel, like the minerals specified in the latter act, were not intended to be disposed of under the mining laws." This reasoning appears quite plausible at first blush, but is completely rebutted by the express language of the Materials Act itself, which as has been shown, pro-

vides for the disposal of these materials only to the extent not otherwise expressly authorized by law, *including the United States mining laws.* It is further refuted by the legislative history of the Materials Act, which is appended to this brief. Particularly significant are the following quotations gleaned from the reports of the Congressional committees concerned with this legislation as well as from the recommendations of the Department of the Interior:

> "Explanation of the bill. The purpose of this bill is to authorize the Secretary of the Interior to dispose of materials, including but not limited to those enumerated in the bill, for the disposal of which no present authority exists. *It supplements present disposal methods and does not conflict with them.* The disposals would be subject to three conditions:
>
> 1. The disposal of the materials must not be otherwise expressly authorized by law. *This prevents conflict with* such laws as the national forest timber laws and *the mining laws.*" (Emphasis supplied.)
>
> See: Report of the Committee on Public Lands, House of Representatives, (80th Cong. 1st Session), No. 867*; and also Report of the Committee on Public Lands, U.S. Senate, (80th Cong. 1st Session), No. 204, concurring in the above without amendment*;
>
> "The proposed bill would authorize the Secretary of the Interior to dispose of *sand, stone, gravel,* vegetation, timber, and other materials or re-

**Vide infra,* Appendix to Appellants' brief.

sources on the public lands with the exception of those in national forests, national parks, national monuments, or Indian lands, *if such disposal is not otherwise expressly authorized* or prohibited *by law* and if he finds that such disposal would not be detrimental to the public interest. Thus, *the bill would not interfere with or impair the operation of the mining laws* or of the Taylor Grazing Act * * *. Included in the materials to which it is contemplated the proposed bill would apply are: * * * 2. *Sand, stone, and gravel not of such quality and quantity as to be subject to the mining laws* but which are desired by local governments, railroads, local industries, ranchers, and farmers for the construction and maintenance of highways, secondary roads, railroads, structures of various kinds, and farm and ranch improvements." (Emphasis supplied.)

See: Letter of transmittal, dated April 10, 1947, from Oscar L. Chapman, Undersecretary of the Interior to Honorable Arthur H. Vandenberg, President pro tempore, United States Senate*.

Thus the express language of the statute which provides for the disposal of such materials or resources if such disposal "is not otherwise expressly authorized by law, *including the United States mining laws,*" the legislative history of the bill, and the consistent contemporaneous construction of the mining laws by the Land Department, which was known to the Congress at the time of the enactment of the

Vide infra, Appendix to Appellants' brief.

Materials Act all combine to lead to one inescapable conclusion. It is this: that far from intending to eliminate from the operation of the mining laws the substances known as sand and gravel, in a manner analogous to that in which the Mineral Leasing Act of February 25, 1920 eliminated coal, oil and gas, and other specifically enumerated substances, the Materials Act was designed to supplement and to confirm, the previously authorized disposal of sand and gravel under the United States mining laws, as recognized by the Land Department of the United States and by the courts.

In view of these authorities it is respectfully submitted that the pertinent conclusions of the learned Trial Judge on this issue contained in his opinion (R. 37-38) were erroneous and that sand and gravel, both prior to and—with added emphasis—since the enactment of the Materials Act, have been and are being considered by both judicial and administrative decisions as mineral substances within the purview of the mining laws of the United States.

SECOND ARGUMENT.

A. UNDER THE MINING LAWS OF THE UNITED STATES A VALUABLE DISCOVERY MAY VALIDLY BE MADE OF SAND AND GRAVEL FOUND ON THE SURFACE.

In the remainder of his opinion, the learned Trial Judge, having disposed of available precedents on the further ground that "undue weight was given to the value of gravel, as reported by the United States Geo-

logical Survey, and that the rule there enunciated may be attributed to a shift of emphasis from composition of the substance alleged to be mineral to value" (R. 36), concludes that sand and gravel are not minerals, "particularly where the location is made on land consisting almost exclusively of gravel, not only for the reasons stated by the authorities cited, but also because effect must be given to the implications of the word 'discovery' in 30 U.S.C.A. 23 and the clause 'and the lands in which they (mineral deposits) are found' in Section 22 of that title." From this he concludes that "Congress must have had in mind minerals which exist separately and differ from the surrounding matter in which they are found and from which they may be taken only by extraction and mining." The opinion, in coming to the conclusion that in the case at bar there was no valuable discovery, states that "in the traditional sense it is difficult to conceive of a discovery not attendant with great hardship, effort and expense." For this proposition, 2 Lindley on Mines, (3rd ed.), Section 437 is cited by the Trial Court.

Diligent reading of the textual section cited fails to yield any such quotation or even inference. On the other hand, the self-same section contains the following statement of the law which appears to be in direct conflict with the conclusions of the Trial Court:

> "In the case of ordinary surface deposits such as the auriferous gravels, we encounter no serious difficulty in determining the sufficiency of a given discovery. The existence of the deposit is obvious,

> and the only inquiry is as to its commercial value or the extent of its mineral contents as justifying the expenditure of time and money in its development and exploitation."
>
> *loc. cit.*, at p. 1023.

This statement of the law is a far cry from the language found in the opinion of the learned Judge below (R. 37), who says "to say that a discovery of gravel may be made in a large area of gravel open to view is to say that there can be a discovery of water in Cook Inlet or snow on Mount McKinley. Such a perversion of the term would not only obliterate the safeguard referred to and result in the appropriation of large areas of the public domain to the detriment of the public, but it would also ignore the clause 'and the lands in which they are found' in Section 22 of Title 30. It is inconceivable that this was within the contemplation of Congress."

This novel view that by "discovery" of a valuable mineral substance Congress meant the finding thereof in some hidden or unattainable place, or in a place inaccessible to man except by exploration attended with great hardship, is not supported anywhere by the language of the Act nor by the interpretations given to the term by the courts or standard authorities. Section 23 of Title 30, United States Code Annotated, referred to in the Trial Court's opinion (R. 36)—which, incidentally, appears to be limited to lode or vein locations as distinguished from placers —states that "no location of a mining claim shall be

made until the discovery of the vein or lode within the limits of the claim located." In referring to this section, Mr. Lindley, in his well known treatise on the mining laws states:

> "But this provision of the statute does not require that the locator of the claim must be the original discoverer of the vein or lode. If there has been a discovery by someone other than the locator, and the latter has knowledge of the existence of mineral and adopts the former discovery, he is entitled to make a location."
>
> Lindley on Mines, (3rd ed.), Sec. 335, at p. 763, citing cases.

And compare once again the language of Section 437 in the same work with reference to surface deposits, which has just been quoted above.

Certainly it cannot be said, as a matter of law, that known, extensive surface deposits of mineral matter cannot be "discovered" or "rediscovered" and are thus necessarily unavailable to location under the mining law. That the appropriation of such deposits by enterprising miners might "result in the appropriation of large areas of the public domain to the detriment of the public" (R. 37), is not only debatable, but is a matter of legislative policy not to be lightly reversed by *obiter* in the opinion of a trial court called upon to decide primarily the priority of possessory rights as between conflicting claimants, in a proceeding ancillary to Land Office administration of the mining laws. Because gravel as a

mineral is widely distributed in certain parts of Alaska, and as such may be located over wide areas, does not mean, as the lower Court (perhaps facetiously?) suggests that there could be mining of "water in Cook Inlet or snow on Mount McKinley" (R. 37). There is no legal precedent holding water or snow to be minerals and until Congress so legislates or the courts so decide, the danger of appropriation of Cook Inlet or Mount McKinley by zealous prospectors may be considered fairly remote.

The language of 30 U.S.C.A. 22, quoted by the Court, which provides that "lands in which (mineral deposits) are found" shall be open to occupation and purchase, does not appear to lend such color to the Trial Court's conclusions as the opinion seems to suppose (R. 36-37). The term "lands", when given its common sense meaning, refers to a portion or parcel of the public domain which, when found to embrace within its boundaries substances recognized as minerals, may be occupied and purchased under appropriate procedures. But even accepting at face value the Trial Court's interpretation of the quoted terminology, to the effect that "Congress must have had in mind minerals which exist separately and differ from the surrounding matter in which they are found and from which they may be taken only by extraction and mining" (R. 36-37), it does not follow that extensive surface deposits are consequently excluded, or else the common technique known as "strip mining" could never have been developed. It is com-

mon knowledge that even abundant gravel deposits are underlain, at relatively shallow depth, by fundamental strata of bedrock, from which they "differ" and "exist separately", and "from which they may be taken" by strip mining.

It must be concluded therefore, that the Trial Court erred in holding, or at least inferring, that sand and gravel cannot, as a matter of law, constitute a valuable mineral "discovery" under the mining laws. Neither can the Trial Judge's ruling be sustained on the ground that this specific gravel deposit does not constitute the discovery of a valuable mineral deposit, a proposition which is the subject matter of the next-succeeding argument.

B. WHETHER ANY SPECIFIC DEPOSIT OF SAND AND GRAVEL CONSTITUTES SUCH A VALUABLE DISCOVERY WHICH WILL MAKE THE LANDS IN QUESTION MINERAL IN CHARACTER, SO AS TO GIVE A LOCATOR A PREFERENCE RIGHT OVER AGRICULTURAL CLAIMANTS, IS SOLELY FOR THE DETERMINATION OF THE LAND DEPARTMENT OF THE UNITED STATES AND NOT FOR THE COURT IN THE TYPE OF PROCEEDING HERE INVOLVED.

If any principle of the mining laws has been universally and definitively established, it is that the determination of the mineral character of the land is solely for the determination of the Land Department of the United States and not for the courts.

It has been consistently held for many years that the decision as to the mineral or non-mineral char-

acter of land is for the Land Department and not for the courts:

In the case of *Burfenning v. Chicago, St. Paul, Minneapolis & Omaha Railway Co.* (1896), 163 U.S. 321, 323, it is stated:

> "It has undoubtedly been affirmed over and over again that in the administration of the public land system of the United States questions of fact are for the consideration and judgment of the Land Department, and its judgment thereon is final. Whether, for instance, a certain tract is swamp land or not, saline land or not, mineral land or not, presents a question of fact not resting on record, dependent on oral testimony; and it cannot be doubted that the decision of the Land Department, one way or the other, in reference to these questions is conclusive and not open to relitigation in the courts, except in those cases of fraud, etc., which permit any determination to be reexamined. Johnson v. Towsley, 13 Wall. 72; Smelting Company v. Kemp, 104 U.S. 636; Steel v. Smelting Company, 106 U.S. 447; Wright v. Roseberry, 121 U.S. 488; Heath v. Wallace, 138 U.S. 573; McCormick v. Hayes, 159 U.S. 332."

In the case of *Cosmos Exploration Company v. Gray Eagle Oil Company,* (1903), 190 U.S. 301, it was held that the Land Department has the statutory right to make rules and regulations, and that the Courts will take judicial knowledge of such rules and regulations as shall be made by it regarding the

sale or exchange of public lands. It was further held at page 314:

> "What may be the decision of the Land Department upon these questions in this case, cannot be known, but until the various questions of law and fact have been determined by that Department in favor of complainant it cannot be said that it has a complete equitable title to the land selected. * * * The Government has provided a special tribunal for the decision of such a question arising out of the administration of public land laws, and that jurisdiction cannot be taken away from it by the Courts. U. S. v. Schurz, 102 U.S. 378, 395."

To the effect that decisions of the Land Department on the question of the character of public lands are conclusive on the Courts, see *Johnson v. Morris,* (Cal., 1896), 72 F. 890, 897, 898, 19 C.C.A. 229; *Heckman v. Mumford,* (1911), 4 Alaska 299; *Potter v. Randolph,* (1899), 58 P. 1905, 126 Cal. 458; *Jameson v. James,* (Cal. 1909), 100 P. 700, 155 Cal. 275; *Van Ness v. Rooney,* (1911), 116 P. 392, 160 Cal. 131, writ of error dismissed (1913) 34 S.Ct. 316, 231 U.S. 737, 58 L. Ed. 460; *LeFevre v. Amonsen,* (1905), 81 P. 71, 11 Idaho 45; *Earl v. Morrison,* (Nev. 1915), 154 P. 75; *Johnson v. Bridal Veil Lumbering Co.,* (1893), 24 Or. 182, 33 P. 528; *Ferry v. Street,* (1886), 4 Utah 521, 11 P. 571, appeal dismissed (1886) 7 S.Ct. 231, 119 U.S. 385, 30 L.Ed. 439; *Gauthier v. Morrison,* (1911), 114 P. 501, 62 Wash. 572, reversed on other grounds (1914) 34 S.Ct. 384, 232 U.S. 452, 58 L.Ed.

680. See also: *Behrends v. Goldsteen,* (1902), 1 Alaska 518 and *Sheldon v. Seatter,* (1910), 4 Alaska 95.

While matters affecting the disposition of public lands are undetermined in the land office, the Courts have no jurisdiction thereof. *Johnson v. Towsley,* (Neb. 1871), 13 Wall. 72, 82, 20 L.Ed. 485; *McDaid v. Oklahoma,* (Okla. 1893), 14 S.Ct. 59, 62, 150 U.S. 209, 37 L.Ed. 1055; *Kirwan v. Murphy,* (1903), 23 S.Ct. 599, 603, 189 U.S. 35, 47 L.Ed. 698 (reversing (Minn. 1901) 109 F. 354, 48 C.C.A. 399); *Bockfinger v. Foster,* (Okl. 1903), 23 S.Ct. 836, 840, 190 U.S. 116, 47 L.Ed. 975; *Oregon v. Hitchcock,* (Or. 1906), 26 S. Ct. 568, 570, 202 U.S. 60, 50 L.Ed. 935; *Allen v. Pedro,* (1902), 68 P. 99, 136 Cal. 1; *LeFevre v. Amonsen,* (1905), 81 P. 71, 11 Idaho 45; *Copley v. Dinkgrove,* (1873), 25 La. Ann. 577; *Marks v. Martin,* (1875), 27 La. Ann. 527, affirmed (1877) 97 U.S. 345, 24 L.Ed. 940; *Hall and Legan Lumber Co. v. Jeter,* (La. 1910), 53 So. 533; *St. Paul, M. & M. Ry. Co. v. Olson,* (1902), 91 N.W. 294, 87 Minn. 117; 94 Am. St. 693; *Commager v. Dicks,* (1892), 1 Okl. 82, 28 P. 864; *Proctor v. Stuart,* (1896), 46 P. 501, 4 Okl. 679; *Wilbourne v. Baldwin,* (1897), 47 P. 1045, 5 Okl. 265; *Fitzgerald v. Keith,* (1897), 48 P. 110, 5 Okl. 260; *Hammer v. Hermann,* (1901), 65 P. 943, 11 Okl. 127; *Hebeisen v. Hatchell,* (1902), 69 P. 888, 12 Okl. 29; *Best v. Frazier,* (1906), 85 P. 1119, 16 Okl. 523; *Pin v. Morris,* (1856), 1 Or. 230; *Moore v. Fields,* (1860), 1 Or. 317; *Empey v. Plugert,* (1885), 64 Wis. 603, 25 N.W. 560.

"* * * that the courts have no jurisdiction to determine questions of fact with reference to the public lands while the claims of the respective parties are pending before the Land Department is axiomatic * * * When, therefore, the jurisdiction of the Land Department is once set in motion, and that tribunal is engaged in the investigation which necessarily involves a determination of the character of the land, and which determination would be conclusive, the courts are precluded from trying or determining the question."

Lindley, Mines, Vol. 1, Section 108, page 188-9.

Thus, Congress has in effect designated the Land Department as a "legislative" court:

"* * * the Congress, in exercising the powers confided to it, may establish 'legislative' courts (as distinguished from 'constitutional courts in which the judicial power conferred by the constitution can be deposited') which are to form a part of the government of the territories or of the District of Columbia, or to serve as special tribunals 'to examine and determine various matters, arising between the government and others, which from their nature do not require judicial determination and yet are susceptible of it'. But 'the mode of determining matters of this class is completely within Congressional control. Congress may reserve to itself the power to decide, may delegate that power to executive officers, or may commit it to judicial tribunals * * *' Familiar illustrations of administrative agencies created for the determination of such matters are found in connection with the exercise of the Congressional power as to interstate and foreign

commerce, taxation, immigration, the public lands, public health, the facilities of the post office, pensions and payments to veterans."

Crowell v. Benson, 285 U.S. 22, 50.

This does not leave the Territory of Alaska without a tribunal in which it can be heard. 43 C.F.R. Section 221.1 permits contests or protests to be initiated by any person claiming an interest in the land; Sections 185.89 to 185.92 provide the procedures for protests and contests; 30 U.S.C.A. Section 40 provides the manner of taking testimony and proofs relating to contests as to the mineral or agricultural character of land.

While there is no doubt that in a proceeding under the provisions of 30 U.S.C.A. 30, the court has authority to determine whether the land may be located, *as a matter of law,* under the provisions of the mining statutes in those cases where a basic legal issue exists, nevertheless it is equally clear that in the absence of some fatal legal obstacle the determination of the questions of fact which underlie the validity and patentability of a mining location, are *exclusively* for the land office of the Department of the Interior.

Insofar as the proceedings in the Court below are concerned, their purpose is merely to adjust and settle the conflicting possessory claims of all parties concerned before a patent issues.

Enterprise Min. Co. v. Rico-Aspen (C.C.A., Colo., 1895), 66 F. 200, affirmed (1897) 167 U.S. 108, 17 S.Ct. 762, 42 L.Ed. 96.

Other than that, the jurisdiction of the Land Office is and remains exclusive and any questions between the party entitled to priority of claim and the Government, pertaining to the merits of the location, are left to the determination of that agency.

Burke v. Bunker Hill Min. Co., (C.C.A., Ida., 1891), 46 F. 644, 647;

Warnekros v. Cowan, (Ariz., 1910), 108 P. 238.

It follows that the Trial Court's speculations with respect to the supposed value or lack thereof of the mineral discovery which is the subject matter of this action were beyond the scope of the statutory authority conferred upon it in this type of proceeding and should be disregarded.

THIRD ARGUMENT.

SCHOOL LANDS IN ALASKA WERE SUBJECT TO DISPOSITION UNDER THE MINING LAWS OF THE UNITED STATES DURING 1950, THE TIME OF THE LOCATIONS IN QUESTION.

The Act of March 4, 1915, c. 181, Section 1, 38 Stat. 1214, 48 U.S.C.A. Section 353, reserved Sections 16 and 36 in each township in Alaska, not known to be mineral in character at the time of survey, from sale or settlement for the support of common schools in the Territory of Alaska, and gave the Territory the right to lease such sections.

The Act of August 7, 1939, c. 516, 53 Stat. 1243, revised the 1915 Act as follows:

"Be it enacted by the Senate and House of Representatives of the United States of America in

Congress assembled, that the Act of Congress approved March 4, 1915 (38 Stat. L. 1214-1215), being an Act to reserve lands of the Territory of Alaska for educational uses, and for other purposes, be, and the same is hereby, amended by adding to the first section of the Act the following: 'Timber on the reserved lands may be sold by the Secretary of the Interior under the provisions of Section 11 of the Act of Congress approved May 14, 1898 (30 Stat. 409-414), and such lands and the minerals therein shall be subject to disposition under the mining and mineral leasing laws of the United States, upon conditions providing for compensation to any territorial lessee for any resulting damages to crops or improvements on such lands, but the entire proceeds or income derived by the United States from such sale of timber and disposition of the lands or the minerals therein are hereby appropriated and set apart as permanent funds in the Territorial Treasury, to be invested and the income expended for the same purposes and in the manner hereinbefore provided for. Any leases issued by the Territory after a valid appropriation of such reserved lands under the mining laws or the mineral leasing laws of the United States shall be with due regard to the rights of the mineral claimant.

The Secretary of the Interior is hereby authorized to make all necessary rules and regulations in harmony with the provisions and purposes of this Act for the purpose of carrying the same into effect.' "

Appellants located their placer mining claims during 1950.

The Act of March 5, 1952, c. 80, Sections 1-3, 66 Stat., 14, repealed the 1939 Act as follows:

> "Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,
>
> Sec. 1. That the Act ofAugust 7, 1939 (53 Stat. 1243; 48 U.S.C. Sec. 353) be, and is hereby, repealed.
>
> Sec. 2. Section 1 of the Act of March 4, 1915 (38 Stat. 1214, 1215) as amended (48 U.S.C. 1946 edition, Sec. 353), is hereby amended by striking out the following language in the last proviso of that section; 'if any of the said sections, or any part thereof, shall be of known mineral character at the date of acceptance of survey thereof, the reservation herein made shall not be effective or applicable, but the entire proceeds or income derived by the United States from such sections sixteen and thirty-six (16 & 36) and such section thirty-three (33) in each township in the Tanana Valley area hereinbefore described, and the minerals therein, together with'.
>
> Sec. 3. Section 1 of the Act of March 4, 1915 (38 Stat. 1214-1215) as amended (48 U.S.C. 1946 edition, sec. 353) is further amended by adding the following language at the end of the section: 'Nothing in this Act shall affect any lands included within the limits of existing reservations of or by the United States, or lands subject to or included in any valid application, claim, or right initiated or held under any laws of the

United States unless and until such reservation, application, claim or right is extinguished, relinquished or cancelled.' "

After the enactment of the 1952 Act, Appellants Schubert *et al.,* applied for patent to their placer mining claims under the saving clause of the 1952 Act; Superior Sand and Gravel Mining Co., Inc., Appellant, and Anchorage Sand and Gravel Company, Inc., filed adverse claims in the Land Office and commenced these proceedings as required by 30 U.S.C.A. Sec. 30 and 48 U.S.C.A. Sec. 386, to determine their rights as adverse mineral claimants.

As a matter of first impression, it would appear that the 1939 Act gave prospectors the right to go upon school lands to prospect for minerals and to locate and patent their claims; and that the 1952 Act took away that right but preserved existing equities. The first impression is substantiated by a review of existing law.

The problems of whether school sections are available for mining locations is not a new problem although the wording of the statute may vary slightly in each individual case. The various grants to the states and territories of Sections 16 and 36 for school purposes generally excepted lands mineral in character. However, even when the granting statute was silent on the subject, the Supreme Court has repeatedly held that the grant must be used in the light of the mining laws, the school land indemnity law, and the settled public policy respecting mineral lands

and not as though the granting constituted the sole evidence of the legislative will, and the basis of such reasoning has held that mineralized school sections were impliedly excluded from the grant. California and Utah are two states where the granting statute was silent. In each state, the Supreme Court has held that the grant did not include mineral lands, even though the state, or its successor in interest, had dealt with the lands as its own for many years.

Mining Co. v. Consolidated Mining Co., 102 U.S. 167 (regarding California); *Werk, Secretary of the Interior v. Braffett,* 276 U.S. 560 (regarding Utah); *United States v. Sweet,* 245 U.S. 563 (regarding Utah); *Dunbar Lime Co. v. Utah-Idaho Sugar Co.,* 17 Fed. (2d) 351 (regarding Utah).

In the case now before the Court, the 1915 Act is not a grant to a State of school lands but merely a reservation for the benefit of the schools of the Territory. The Territory has no right of possession for its own purposes, but may act as the agent of the United States for leasing purposes. The United States reserves the right to sell materials on the school sections, as will appear from a reading of that Act and the rules and regulations of the Bureau of Land Management, Department of the Interior, contained in Title 43 of the Code of Federal Regulations, and particularly Part 259 thereof. This was actually done in this case when sand and gravel was sold by the Government to one of the parties to this litigation. (R. 4.)

Therefore, the position of the Territory of Alaska is not nearly as strong fundamentally as the position of California and Utah after they became states, and in both those states school sections were held to be available for mining locations. Appellants believe that the school sections in Alaska were open to mining locations under the settled policies of the Government even without the enactment of the 1939 Act.

It is interesting to note that the mining claims in question in this case caused the enactment of the 1952 Act, as is shown by the legislative history of the Act as contained in Volume 2 of the United States Code and Administrative News for the 82nd Congress—Second Session, 1952, at pages 1341-4.*

A careful reading of the legislative history of the 1952 Act shows conclusively that the Governor of the Territory of Alaska, the Secretary of the Interior, and the members of both the Senate and House committees, recognized the validity of placer mining claims for sand and gravel in general under the 1939 Act and specifically recognized that the claims of Appellants herein were valid placer mining claims of commercially valuable deposits of sand and gravel.

The Trial Court in its opinion (R. 32), makes brief reference to the contention of the Territory of Alaska that these placer locations were invalid because of the existence of prior surface leases to third parties. The language of the enabling act quoted above makes it

**Vide infra,* Appendix.

clear that Congress contemplated the contemporaneous existence of mining claims and surface leases without regard to their respective priority and intended that lessees should not be able to defeat the fruition of such mining claims, subject only to the right to compensation for any resulting damages to crops or improvements. There are no allegations in this case that because of the absence of indemnification arrangements to Territorial lessees these mining claims are invalidated, but if that inference should arise, reference is here made to the only adjudicated case dealing with this precise issue. The highest Court of the State of Wyoming held in the case of *Scoggin v. Miller* (1948), 189 P. 2d 677, that the alleged fact that locators of placer mining claims had not settled with owners of surface rights as to damages or given bond to protect their interests, did not invalidate the locations in so far as proceedings on adverse claims were concerned. Moreover, it was held in this case that where both plaintiff and defendant claimed title to the mining claims from a common source, the United States, under the general mining laws, the only question before the Court was who had the better title and consequent right of possession.

There is nothing in the Trial Court's opinion, however, to indicate that it took a contrary view and it appears that it considered decision of this point unnecessary in view of the conclusion it reached on the issues previously discussed.

V. CONCLUSION.

In considering the correctness of the lower Court's decision in this case, the Appellants contend that first consideration must be given to the scope of the proceedings from which this appeal arises.

Clearly, we are dealing here with a unique statutory adverse proceeding, based upon specific authority conferred by Congress upon the Courts for the purpose of assisting the executive branch of the United States Government in its quasi-judicial functions involving the adjudication of mining claims and the disposal of mineral lands under the mining laws. Congress recognized that in the course of adjudicating applications for mining patents the Land Department would be frequently confronted with conflicting or overlapping claims to possessory rights in mineral lands and intended to preserve to claimants resort to the Courts of the land with their traditional methods of adjudication of such competing interests. The authorities are unanimous that in doing so, Congress did not intend to remove from the Land Department, or limit in any way, its exclusive jurisdiction over the determination and classification of mineral lands and the processes involved in the issuance of mining patents. In such an ancillary proceeding the Court's inquiry is therefore strictly limited to the question of priority, although as a result of the basic doctrine that courts will not rule on hypothetical or futile issues the Trial Court necessarily inquires into any fatal legal defects in the claims of the parties to the litigation.

The Court below did therefore address itself correctly to the issue of whether sand and gravel are minerals, *as a matter of law,* within the meaning of the general mining statutes enacted by the Congress of the United States. Appellants contend, however, that the Trial Court's conclusions on this point, are erroneous in that they disregard, unjustifiably, the virtually unanimous agreement of the courts, the executive departments, and the standard authorities. In so far as the decision here appealed from appears to be based on the learned Judge's conceptions of what public policy ought to be (R. 37), suffice it to say that the legislative branch of the government apparently thought otherwise and that in it is reposed the constitutional power to make or change such policies.

In so far as the Trial Court's conclusions are sought to be buttressed by reference to the Materials Act, the above discussion of the legislative history of that statute seems to indicate quite conclusively an opposite legislative intent from that deduced by the lower court in this case. Moreover, even in the absence of legislative history, both an examination of the explicit language of the Materials Act and the application of elementary principles of statutory construction compel a result contrary to that reached by the Court below. For example, the opinion of the court below would in effect repeal the provisions of 30 U.S.C.A. Section 161, extending the general placer mining laws to building stone. Implied repeals are not favored and will not be adopted unless there are overriding

considerations which inescapably compel such a result. The Materials Act, moreover, refers only to the disposal of certain substances and not to the purchase of the lands containing them, while the mining laws contemplate the occupation and purchase of the lands themselves, incident to the right to extract the minerals. The term "mineral" in the general mining laws has been interpreted to mean a variety of items; the word "materials" in the Materials Act would cover an even greater variety, as is evidenced by the specific inclusion of four items of vegetation (yucca, manzanita, mesquite, and cactus). To hold that the Materials Act provides an exclusive procedure could well mean the repeal of all prior mining laws, including the Mineral Lands Leasing Act, for all minerals are materials, but materials are not necessarily minerals. There is no point of compromise; either the Materials Act supersedes the mining laws or it supplements them; there is no criterion in the Act for determining that it supersedes the mining laws as to some items (for instance stone which is specifically mentioned) but not as to others.

Further, the Materials Act alone cannot be considered as constituting the sole evidence of the legislative will, but must be read in connection with the mining laws, the Mineral Lands Leasing Act, the Building Stone Act, and all other relevant provisions of the statutes, and the settled public policy respecting mineral lands. On such a basis, it could not be considered that Congress or the Department of the

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Interior intended that the Materials Act should supersede the mining laws. If Congress had so intended, it would not have been necessary in 1952 to repeal the 1939 Act permitting mining locations on Alaska school lands—keeping in mind that the mining claims of Appellants were the moving cause of the 1952 Act and that the legislative history of the 1952 Act recognizes the validity of the mining locations of Appellants.

It is of special note that the operation of the Materials Act is permissive and therefore cannot be construed as being conclusive. Foremost of all, the Materials Act, by its express terms, shows that it was intended as legislation *supplemental to the general mining laws* rather than in conflict with them and not for the purpose of repeal thereof. It was designed mainly to cover those marginal deposits of the substances or materials mentioned in the Act which, while of insufficient quality and quantity to satisfy the requirements of the mining laws, might still be of some utility, locally or under special circumstances, and whose disposal, apart from the land, could not otherwise be accomplished under existing legislation. It would seem to pervert completely the clear intent of this legislation to place it on a par with the Mineral Leasing Act *(supra),* and to claim that it was intended to derogate from the force of the mining laws, when by its express terms, it clearly negates any such inference.

Last, but not least, it should be borne in mind that the Territory of Alaska apparently attempted, by its

Motion to Dismiss, to do *indirectly* that which it could not do directly. It must have been clear to the representatives of the Territory that it would not be possible to induce the Land Department to overrule its holding of many years standing, to the effect that sand and gravel *are* minerals within the purview of the mining laws. This finding was made by the Department as a *general rule,* to apply to *all* the public lands throughout the United States, its Territories and possessions, and the Department undoubtedly would not upset such a ruling merely because the public interest concerned with the schools of the Territory of Alaska might be better served in this one instance by a different result, particularly when it is considered that Congress, in enacting the enabling statute, quoted above, must have intended to make this particular local public interest subservient to the greater national interest involved in the development generally of mineral resources in the Territory of Alaska.

Under these circumstances the decision of a local Trial Court, perhaps overly impressed with local problems and local policy considerations, should not be allowed to stand. This is most certainly the exact situation which Congress meant to prevent when it clothed the Land Department with nationwide, exclusive, authority to decide the character of public lands under generally applicable rules and regulations.

A decision by this Court as to the character of the land would invalidate the entire procedural safe-

guards established by the Land Department for the determination of this question. It would, in effect, repeal the regulatory and rule making powers of the Land Department as to public lands and throw every protest or contest, as well as adverse claims, into the courts.

The mineral claimants, being all parties other than the Territory, must have a decision on the status of their respective possessory rights as between themselves before they can return to the Land Office and complete the necessary steps to perfect their claims and secure patents, if they are entitled to patents. Affirmance by this Court of the Order of the Trial Court would forever bar them from such further proceedings. However, the reversal by this Court of the Order of the Trial Court would in no wise bar the Territory from contesting or protesting the mineral character of the land or even the right of the mineral claimants to locate mineral claims of any description on the lands involved; the Territory can do so before the Land Department at any time prior to the issuance of patent (43 CFR 185.89).

For the foregoing reasons and upon the authorities cited above, the Appellants herein earnestly urge this Honorable Court that the decision of the Trial Court dismissing the Complaints herein should be reversed and that the cause should be remanded for further proceedings, to determine the priority of possessory rights as between the respective parties, subject to the ultimate adjudication and issuance of patent by the

Land Office of the United States Department of the Interior.

Dated, Anchorage, Alaska,
June 18, 1954.

Respectfully submitted,
E. L. ARNELL,
VERNE O. MARTIN,
Attorneys for Appellants,
Northern Construction Association
and Ellsworth E. Saxton, Agent.

(Appendix Follows.)

Appendix.

Appendix

LEGISLATIVE HISTORY.

Act of March 5, 1952, c. 80, Sections 1-3, 66 Stat. 14.
Alaska—Public Lands—Reservations for Educational Purposes.

See Legislative History, Page 1341.

Chapter 80—Public Law 270 (H. R. 3100).

An Act to Repeal the Act of August 7, 1939 (53 Stat. 1243; 48 U. S. C., Section 353).

Be it Enacted by the Senate and House of Representatives of the United States of America in Congress as assembled that:

The Act of August 7, 1939 (53 Stat. 1243; 48 U.S.C., Sec. 353) be, and is hereby repealed.

Sec. 2. Section 1 of the Act of March 4, 1915 (38 Stat. 1214, 1215), as amended (48 U.S.C., 1946 edition, sec. 353), is hereby amended by striking out the following language in the last proviso of that section: "if any of said sections, or any part thereof, shall be of known mineral character at the date of the acceptance of the survey thereof, the reservations herein made shall not be effective or applicable but the entire proceeds or income derived by the United States from such sections sixteen and thirty-six and such section thirty-three in each township in the Tanana Valley area, hereinbefore described, and the minerals therein, together with."

Section 3. Section 1 of the Act of March 4, 1915 (38 Stat. 1214, 1215), as amended (48 U. S. C., 1946 edition, section 353) is further amended by adding the following language at the end of the section:

"Nothing in this Act shall affect any lands included within the limits of existing reservations of or by the United States, or lands subject to or included in any valid application, claim, or rights initiated or held under any laws of the United States, unless and until such reservations, application, claim, or right is extinguished, relinquished, or cancelled."

Approved March 5, 1952.

Alaska—Public Lands—Reservations for Educational Purposes.

Senate Report No. 1170, Feb. 14, 1952 (To Accompany H. R. 3100);

House Report No. 559, June 13, 1951 (To Accompany H. R. 3100);

The Senate Report repeats in substance the House Report.

Senate Report No. 1170.

The Senate Committee on Interior and Insular Affairs to whom was referred the bill, H. R. 3100, to repeal the act of August 7, 1939 (53 Stat. 1243; 48 U. S. C., sec. 353), having considered the same report favorable thereon without amendment and with the recommendation that the bill to pass.

The Committee heard representatives of the Interior Department and Governor Gruening of Alaska, who

appeared in behalf of the bill. They were unanimous in support of the measure.

The reasons for early action were set forth by Governor Gruening in a letter to the Chairman of the Committee as follows:

I will mention Delegate Bartlett's H. R. 3100 designed to repeal the Act of August 7, 1939 (53 Stat. 1243; 48 U. S. C. A., 353, pocket supplement) whereby reserved school sections were made subject to disposition under the mining law. Some months ago this provision was shown to be extremely costly to Alaska's permanent school fund when private parties staked the most valuable school section in Alaska, basing their mineral claims on their alleged discoveries of gravel. Actually the United States had used the gravel for some years and had noted its presence in original survey filed notes.

At the moment of staking, negotiations were under way in the Land Office for issues of a permit to a private contractor for extraction of gravel from this very section. From that permit alone the school fund would have realized over $13,000 on a yardage royalty basis, by virtue of legislation enacted by Congress last year (Public Law 744, August 31, 1950). Estimates of the section's value, based upon its gravel content have run as high as $2 million. An extreme shortage of gravel in the area places a premium value on the section and assures a market for its gravel. Moreover, its location on the outskirts of Anchorage, Alaska's major population center, has made the sec-

tion the greatest income producer, through occupancy under lease, of all school sections in Alaska.

The loss of this section under the 1939 Act now sought to be repealed by House R. 3100 is indicative of what may happen to any school section in Alaska. Indeed the example set by the stakers has already been followed by others, on other school sections, and every day's delay in forestalling such staking further endangers the school fund. H. R. 3100 has already passed the House, so early action in the Senate will be immediately beneficial. Accordingly it is imperative that H. R. 3100 be enacted before the permanent school fund suffers irreparable and permanent loss.

* * * * * * *

The House Committee adopted the recommendation of the Interior Department and the Senate Committee concurred in the report submitted by the House Committee which read as follows:

EXPLANATION OF THE BILL.

The Act of March 4, 1915 (38 Stat. 1214, 1215, 48 U. S. C., sec. 353) established a school reserve for the Territory of Alaska, consisting of certain sections of land in each township. The 1915 Act authorized the school reserve lands to be leased by the Territory. The 1915 Act was interpreted, however, as not authorizing the sale of timber or the extraction of minerals. Therefore, the 1939 Act was passed to allow the disposal of such timber and minerals, the proceeds of which were to go to the Territorial school fund. Recently mining

locations for gravel were made on a school reserve section near Anchorage. It was then realized that instead of the Territorial school fund getting the benefit of the value of this section it would all accrue to the locator of the mining claim, except for the small amount realized if he were to apply for a mining patent.

While the repeal of the 1939 Act would prevent the location of mining claims and the depletion of the Territorial school fund at the same time it would not, because of other existing law, prevent the utilization of the timber and other resources of the land for the benefit of the Territorial Schools. The Materials Act of July 31, 1947 (43 U. S. C., sec. 1185 et seq.) provides for the disposal of timber, sand, stone and gravel, and other materials reserved from the public domain. By the Act of August 31, 1940 (public law 744, 81st Cong., 64 Stat. 571), the proceeds received from the disposition of materials from school section lands in Alaska are set apart as separate and permanent funds in the Territorial Treasury, as provided for other income derived from such lands under the 1915 Act.

The amendments adopted by the Committee would eliminate from the Act of March 4, 1915, supra, the exception which excludes from the reserve lands of known mineral character. This is in line with the more general provisions applicable to the school land grants to the States, since the enactment of the Act of Jan. 25, 1927 (44 Stat. 226), as amended (43

U. S. C., sec. 817, et seq.). It also would make it impossible for anyone to stake mining locations on school-reserve sections in Alaska on the ground that they were mineral in character, and therefore not part of the school reserve. The proposed Section 3 which would be added to H. R. 3100 would merely serve to exclude from the grant, as did the 1927 Act, lands subject to other reservations or valid existing rights.

The report of the Department of the Interior to the Chairman of the House Committee on Interior and Insular Affairs is hereinbelow set forth in full and made a part of this report.

* * * * * * *

Department of the Interior
Office of the Secretary
Washington, D. C., May 17, 1951

Hon. John R. Murdock
Chairman, Committee on Interior and Insular Affairs
House of Representatives, Washington, D. C.

My dear Mr. Murdock: This is in reply to the request of your Committee for a report on H. R. 3100, a bill to repeal the Act of August 7, 1939 (53 Stat. 1243; 48 U. S. C., sec. 353).

I recommend the enactment of this bill but suggest certain amendments.

This bill is urgently needed to protect the interest of the Territory of Alaska in the proceeds from lands reserved from sale or settlement for the benefit of Ter-

ritorial School under the Act of March 4, 1915 (38 Stat. 1214, 1215, 48 U. S. C., 1946 ed., section 353). The 1915 Act reserves from disposition specified sections of public domain lands not known to be mineral in character at the time of their survey, and provides that the proceeds derived by the United States from the reserved lands are set apart as permanent funds in the Territorial Treasury, the income of which is to be expended only for the exclusive use and benefit of territorial school as the Alaska Legislature may direct.

The 1915 Act was amended, however, by the Act of August 7, 1939 (53 Stat. 1243) to subject the lands reserved under the 1915 Act to disposition under the mining and mineral leasing laws of the United States and to authorize the sale of timber on those lands, under the Act of May 14, 1898 (30 Stat. 409, 414). The purpose of the 1939 Act was "to provide authority for the sale of the timber and mineral products from such reserved sections" (H. Rept. No. 941, to accompany H. R. 3025, 76th Cong. 1st Sess. June 26, 1939). Even though the 1939 Act made possible greater utilization of the lands reserved for the Territory and therefore generally promoted the basic purposes of the 1915 Act to secure revenue for the support of the territorial schools, the 1939 Act inadvertently opened the way for complete obstruction of the purposes of these two acts by permitting disposal of title to these lands under the United States mining laws. The Territorial school fund would receive little or no income from such disposals.

Legislation such as H. R. 3100 to repeal the 1939 Act and prevent the location of mining claims on lands reserved for the benefit of Territorial schools is now urgently needed. Private individuals have recently been very active in staking mining claims on school Section lands, like those located on valuable tracts of lands on Section 16, Township 3 North, Range 3 West, Seward Meridian, near Anchorage, Alaska.

The repeal of the 1939 Act would not prevent the disposal of materials on lands reserved for the benefit of the Territorial schools, because of the Materials Act of July 13, 1947 (43 U. S. C., 1946 ed., supp. III, Sec. 1185, et seq.). Under the recent amendment of the Materials Act by the Act of August 31, 1950 (64 Stat. 571, Public Law 744, 81st Cong.) the proceeds received from the disposition of materials from school section lands in Alaska are set apart as separate and permanent funds in the Territorial Treasury as provided for other income derived from such lands under the 1915 Act.

To prevent entirely the staking of mining locations on the sections specified in the 1915 Act, because of possible doubt as to whether the lands were known to have been mineral in character at time of acceptance of the plat of survey and also to bring the provisions of the 1915 Act more nearly in line with more generous provisions applicable to the States, ever since the enactment of the Act of Jan. 25, 1927 (44 Stat. 1026), as amended (43 U. S. C., 1946 ed., sec. 870, et seq.) it is recommended that the exemption of mineral lands

from the 1915 Act be deleted. This could be accomplished by adding the following sections to H. R. 3100:

"Sec. 2. Section 1 of the Act of March 4, 1915 (38 Stat. 1214, 1215), as amended (48 U. S. C., 1946 ed., section 353) is hereby amended by striking out the following language in the last proviso of that section: "if any of said sections, or any part thereof shall be of known mineral character at the date of the acceptance of the survey thereof, the reservations herein made shall not be effective or applicable but the entire proceeds or income derived by the United States from such sections sixteen and thirty-six and such sections thirty-three in each township in the Tanana Valley area, hereinbefore described, and the minerals therein, together with."

"Sec. 3. Section 1 of the Act of March 4, 1915 (38 Stat. 1214, 1215) as amended (48 U. S. C., 1946 edition, section 353) is further amended by adding the following language at the end of the section: "Nothing in this Act shall affect any lands included within the limits of existing reservations of or by the United States, or lands subject to or included in any valid application, claim, or rights initiated or held under any laws of the United States, unless and until such reservations, applications, claim, or right is extinguished, relinquished or cancelled."

Since I understand that your Committee desires to hold an immediate hearing on H. R. 3100 this report has not been submitted to the Bureau of the Budget. Consequently I am unable to advise you at present

concerning the relationship of the views expressed herein to the program of the President.

Sincerely, yours,

/s/ Mastin G. White

Acting Assistant Secretary of the Interior.

Calendar No. 205

80th Congress 1st Session | SENATE | Report No. 204

Providing for the Disposal of Materials on the Public Lands of the United States

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May 26 (legislative day, April 21), 1947.—
Ordered to be printed

Mr. Cordon, from the Committee on Public Lands, submitted the following

REPORT

[To accompany S. 1185]

The Senate Committee on Public Lands, to whom was referred the bill (S. 1185) to provide for the disposal of materials on the public lands of the United States, having considered the same, report favorably thereon without amendment and with the recommendation that the bill do pass.

The proposed legislation would authorize the Secretary of the Interior to dispose of sand, stone, gravel,

timber, and other forest products on public lands of the United States. The bill is similar to S. 2126, Seventy-ninth Congress, and is designed to place in the form of permanent legislation authority to dispose of materials on the public lands substantially similar to the temporary authorization of the act of September 27, 1944 (58 Stat. 745, 50 U. S. C. App. secs. 1601-1603). The temporary authorization expired on December 31, 1946, when the President in Proclamation No. 2714 proclaimed the cessation of hostilities in World War II.

Materials subject to the bill would be disposed of for an adequate price after ample public notice. Where the appraised value exceeds $1,000 disposal would be made to the highest responsible qualified bidder by competitive bidding and after publication in a newspaper of general circulation in the county in which it is located. Where the appraised value is $1,000 or less disposition would be upon such notice and in such manner as the Secretary may prescribe.

The Department of the Interior submitted and recommended a bill which is practically identical with this proposed legislation, with the exception that it provided also for the disposal of resources and vegetation. It was the view of the committee that the terms "resources" and "vegetation" were too general and should not be included in a bill of this kind, which conformed to the action of the Senate Public Lands Committee on S. 2126, in the Seventy-ninth Congress in eliminating similar provisions.

Further detailed information concerning this bill is carried in the letter of transmittal, which letter is hereinbelow set forth in full and made a part of this report.

Department of the Interior,
Washington, April 10, 1947.

Hon. Arthur H. Vandenberg,
President pro tempore, United States Senate.

My Dear Senator Vandenberg: Enclosed is a proposed bill to provide for the disposal of materials or resources on the public lands of the United States.

I respectfully request that this proposed bill be referred to the appropriate committee for consideration, and I recommend that it be enacted.

The proposed bill is similar to S. 2126 (79th Cong.). It is designed to place in the form of permanent legislation authority to dispose of materials and resources on the public lands substantially similar to the temporary authorization of the act of September 27, 1944 (58 Stat. 745, 50 U. S. C. App. secs. 1601-1603). The temporary authorization expired on December 31, 1946, when the President in Proclamation No. 2714 proclaimed the cessation of hostilities in World War II.

The proposed bill would authorize the Secretary of the Interior to dispose of sand, stone, gravel, vegetation, timber, and other materials or resources on the public lands with the exception of those in national

forests, national parks, national monuments, or Indian lands if such disposal is not otherwise expressly authorized or prohibited by law and if he finds that such disposal would not be detrimental to the public interest. Thus, the bill would not interfere with or impair the operation of the mining laws or of the Taylor Grazing Act (48 Stat. 1269, 43 U. S. C. sec. 315), as amended.

The materials and resources subject to the bill would be disposed of for an adequate price after ample public notice. Where the appraised value of the material or resource exceeds $1,000, it would be disposed of only to the highest responsible qualified bidder by competitive bidding and after publication in a newspaper of general circulation in the county in which it is located. Where the appraised value is $1,000 or less it would be disposed of upon such notice and in such manner as the Secretary may prescribe.

The proposed bill would extend the policy of the temporary act to public lands which have been withdrawn in aid of a function of a Federal department or agency other than the Department of the Interior, or of a State, Territory, or local governmental unit. In such cases, the Secretary could make disposals under the bill only with the consent of such department, agency, or unit. Instances have arisen where persons have desired the natural products on such withdrawn lands and where there was no objection to the sale, but where no sale could be made because the temporary act reached only lands under the "exclusive jurisdiction" of the Secretary of the Interior.

The bill would also eliminate the $10,000 limit on a single sale contained in the temporary legislation. It is anomalous to require competitive bidding and to have a dollar limit on sales. The estimated value of the resource offered must necessarily be considerably below $10,000 in order to allow for the bidding process. Furthermore the bidders have no reason to bid over $10,000, no matter what their bid would have been in a free market.

The limit has other disadvantages. For example, in the case of timber on public lands which are not suitably located for inclusion in a sustained yield, cooperative agreement under the act of March 29, 1944 (58 Stat. 132, 16 U. S. C. sec. 583), the value of timber in an area suitable for the activities of only one purchaser may be several times $10,000. This limitation prevents the most advantageous disposal of timber in such area. In order for the Government to receive the maximum stumpage value and to obtain maximum productivity through prudent forest management, timber should be sold on the basis of natural logging units which may often contain timber worth more than $10,000. The limitation, therefore, encourages the cutting of only the most desirable and accessible timber in such unit and the leaving of other timber which frequently should be cut to prevent its deterioration. Furthermore, a timber operator incurs certain expenses for logging roads, equipment, structures, and other improvements which must be amortized during the life of the operation. If a sufficiently large block of timber is not made available in one sale to warrant

such necessary expenditures, ordinarily no sale will be consummated. If an operator should submit a bid it would be very low because, not assured of additional supplies of timber in the same area, the entire cost of physical improvements would likely be charged against his small timber allotment. It is also significant to note that all other commercial timber under Federal administration in the United States and Alaska can be sold without a limitation of this kind.

There are on the public lands many materials and resources which can be used profitably for the benefit of local industries and communities and to the disposition of which there is no real objection. There is, however, no permanent legislation under which these may be utilized. The Congress took cognizance of this when it passed the temporary act of September 27, 1944, supra. Since that act has expired, there is no statutory authority to dispose of these useful materials.

Included in the materials to which it is contemplated the proposed bill would apply are:

1. Timber and other forest products which are not susceptible of management under a sustained yield program under the act of March 29, 1944, supra, but which may be disposed of in a manner not harmful to the public interest. Important forest products include turpentine and other derivatives of resin, medicinals, aromatics, tannin, and dyes.

2. Sand, stone, and gravel not of such quality as to be subject to the mining laws but which are desired

by local governments, railroads, local industries, ranchers, and farmers for the construction and maintenance of highways, secondary roads, railroads, structures of various kinds, and farm and ranch improvements.

3. Yucca, manzanita, mesquite, cactus and other desert and mountain vegetation which provide such products as disinfectants and medicinal compounds, soap, food, splints, rope, twine, burlap, baskets, novelties, ornaments, insecticides, and alcohol.

4. Common earth to be used for road fills, earth dams, stock-watering reservoirs, and similar uses.

5. Clay to be used for the manufacture of bricks, tile, pottery, and similar products.

Among the resources listed above, timber and forest products are by far the most important. There still remains under the jurisdiction of the Department of the Interior as scattered tracts or areas outside of existing reservations and outside of the revested Oregon and California grant lands an estimated 3½ to 5 million acres of commercially productive public domain forest land with an estimated volume of at least 6,000,000,000 feet of merchantable saw timber, valued at 20 to 25 million dollars. Woodlands comprise a very much larger area and contribute substantially to meeting the needs of local people for poles, fence posts, fuel wood, and similar products. With the expiration of the temporary act, the Department now has no statutory authority to sell this public domain green timber other than under a sustained yield agreement under the act of March 29, 1944, supra.

An increasing number of applications have been received for the purchase of this public-domain timber. At this time 56 applications are on file for timber in amounts varying in value from several hundred dollars to $50,000 or more. It may be reasonably assumed that a number of persons did not file applications because of the $10,000 limitation or because of the temporary nature of the act.

The timber and other forest products on these lands are a renewable resource. Since timber lessens in value each year following maturity, it should be removed at the time it has its greatest value. This Department, as a long-time advocate of conservation and wise land use, is pledged to maintain these forest and woodlands in a state of good productivity. In order to secure the maximum annual growth and thereby obtain such productivity, it is necessary to remove the mature trees, to make cuttings to prevent stands from becoming stagnated, and to employ other established forest-management practices. These things cannot be accomplished without authority to sell the timber which would be cut under such management practices.

The present shortage of lumber, poles, ties, mine timbers, and other forest products is another impelling reason for disposing of merchantable timber on the public domain in a manner that will benefit the growth and yield of forest stands. Revenues to the Federal Treasury resulting from the proposed legislation would not be insignificant.

This bill would not displace present laws authorizing the disposal of public-land resources, nor would

it provide an alternative method of disposal since it would apply "only if the disposal of such materials or resources * * * is not otherwise expressly authorized by law, including the United States mining laws." National forests are specifically excluded from its operation.

The Bureau of the Budget has advised me that there is no objection to the presentation of this proposed legislation to the Congress.

Sincerely yours,

Oscar L. Chapman,
Under Secretary of the Interior.

A BILL To provide for the disposal of materials or resources on the public lands of the United States.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled. That the Secretary of the Interior, under such rules and regulations as he may prescribe, may dispose of materials or resources, including sand, stone, gravel, vegetation, and timber or other forest products, on public lands of the United States if the disposal of such materials or resources (1) is not otherwise expressly authorized by law, including the United States mining laws, (2) is not expressly prohibited by laws of the United States, and (3) would not be detrimental to the public interest. Such materials and resources may be disposed of only in accordance with the provisions of this Act and upon the payment of adequate compensation therefor, to be determined by the Secretary. Where the lands have been withdrawn in aid of a function of a Federal depart-

ment or agency other than the Department of the Interior or of a State, Territory, county, municipality, water district, or other local governmental subdivision or agency, the Secretary of the Interior may make disposals under this Act only with the consent of such Federal department or agency or of such State, Territory, or local government unit. Nothing in this Act shall be construed to apply to lands in any national forest, national park, or national monument or to any Indian lands or lands set aside or held for the use or benefit of Indians, including lands over which jurisdiction has been transferred to the Department of the Interior by Executive order for the use of Indians.

Sec. 2. Where the appraised value of the materials or resources exceeds $1,000, it shall be disposed of by the Secretary to the highest responsible qualified bidder by competitive bidding and publication of notice of the proposed disposal in a newspaper of general circulation in the county in which the material or resource is located. Such notice shall be published for as many times and for such period as the Secretary may prescribe. Where the appraised value of the material or resource is $1,000 or less, it may be disposed of by the Secretary upon such notice and in such manner as he may prescribe.

Sec. 3. All moneys received from the disposal of materials or resources under this Act shall be disposed of in the same manner as moneys received from the sale of public lands.

80th Congress 1st Session | HOUSE OF REPRESENTATIVES | Report No. 867

Providing for the Disposal of Materials on the Public Lands of the United States

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July 10, 1947.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed.

Mr. Welch, from the Committee on Public Lands, submitted the following

REPORT

[To accompany S. 1185]

The Committee on Public Lands to whom was referred the bill (S. 1185) to provide for the disposal of materials on the public lands of the United States, having considered the same, report favorably thereon with amendments and recommend that the bill do pass.

The amendments are as follows:

Page 1, line 5, after the word "including", insert the words "but not limited to".

Page 1, line 5, after the comma following the word "gravel", insert the words "yucca, manzanita, mesquite, cactus, common clay".

Page 2, line 2, strike out the period following the word "Secretary", and insert in lieu thereof the following:

"*Provided, however,* That, to the extent not otherwise authorized by law, the Secretary is authorized in his discretion to permit any Federal, State, or Territorial agency, unit, or subdivision including municipalities, or any person, or any association or corporation not organized for profit, to take and remove, without charge, materials and resources subject to this Act, for use other than for commercial or industrial purposes or resale."

Page 2, line 20, strike out the words "at least thirty days" and insert in lieu thereof "four consecutive weeks".

Explanation of the Bill.

The purpose of this bill is to authorize the Secretary of the Interior to dispose of materials, including but not limited to those enumerated in the bill, for the disposal of which no present authority exists. It supplements present disposal methods and does not conflict with them. The disposals would be subject to three conditions:

1. The disposal of the materials must not be otherwise expressly authorized by law. This prevents conflicts with such laws as the national forest timber laws and the mining laws.

2. The disposal must not be expressly prohibited by other laws. The bill is not intended to override previous prohibitory legislation.

3. The disposal must not be detrimental to the public interest. This sets a standard for the Secretary

to use in exercising the authority the bill would grant to him.

The bill provides for competitive bidding when the appraised value of the material to be disposed of exceeds $1,000. It also provides that the moneys received shall be disposed of in the same manner as moneys received from the sale of the public lands.

Similar authority of a temporary nature which had been granted to the Secretary of the Interior by the act of September 27, 1944 (58 Stat. 745; 50 U. S. C., App. sec. 1601), expired on December 31, 1946, when the President proclaimed the cessation of hostilities in World War II. That act had proven to be very useful in disposing of such materials as timber and forest products not encompassed by other laws, various types of desert and mountain vegetation, sand, stone, gravel, common earth, and clay. Both local users and the Nation as a whole benefit from the utilization of these resources. Failure to use them in many instances results merely in their being wasted.

The first two committee amendments are designed to broaden the specification of materials covered by the bill as it passed the Senate to include yucca, manzanita, mesquite, cactus, and common clay, all of which the committee believes should be within the scope of the bill. The enumeration is made illustrative rather than exclusive since it would be impossible specifically to name every material for which a valuable use may be found.

The third amendment is designed to authorize the Secretary to issue free use permits allowing Federal, State, and local governmental agencies, nonprofit organizations, and individuals to take and remove the substances covered by the bill without charge for use for noncommercial or nonindustrial purposes. This authorization is similar to that already existing for timber on public lands outside of national forests (16 U. S. C., sec. 604). It would widen the applicability of free use timber permits in Alaska where such permits may now be issued only to specified classes of individuals and to churches, hospitals, and charitable institutions for a limited number of purposes (48 U. S. C., sec. 423). The committee considers that the authorization of such free use permits would result in public benefits which would outweigh any monetary income the Government might receive for the particular materials involved.

The last amendment changing the minimum advertising from once each week for 30 days to once each week for 4 weeks would cut the cost about one-fifth and would result in the saving of considerable money, since the Government would pay for the advertising.

The lengthening time gap between the expiration of the temporary act and the enactment of this measure is causing both waste and confusion with respect to the materials involved. The committee therefore recommends that the bill be promptly enacted.

Similar legislation was introduced in both the Senate and House of Representatives in accordance with

Executive communications suggesting the same to the President pro tempore of the Senate and the Speaker of the House of Representatives. H. R. 3107 was the bill introduced in the House by Hon. Richard J. Welch, chairman of the Committee on Public Lands. S. 1185, which has already passed the Senate, has been substituted for H. R. 3107, and amended.

The Department of the Interior communication favoring this legislation is as follows, and is made a part of this report:

Department of the Interior,
Washington 25, D. C., April 10, 1947.

Hon. Joseph W. Martin, Jr.,
Speaker of the House of Representatives.

My Dear Mr. Speaker: Enclosed is a proposed bill to provide for the disposal of materials or resources on the public lands of the United States.

I respectfully request that this proposed bill be referred to the appropriate committee for consideration, and I recommend that it be enacted.

The proposed bill is similar to S. 2126 (79th Cong.). It is designated to place in the form of permanent legislation authority to dispose of materials and resources on the public lands substantially similar to the temporary authorization of the act of September 27, 1944 (58 Stat. 745; 50 U. S. C., App. secs. 1601-1603). The temporary authorization expired on December 31,

1946, when the President in Proclamation No. 2714 proclaimed the cessation of hostilities in World War II.

The proposed bill would authorize the Secretary of the Interior to dispose of sand, stone, gravel, vegetation, timber, and other materials or resources on the public lands with the exception of those in national forests, national parks, national monuments, or Indian lands, if such disposal is not otherwise expressly authorized or prohibited by law and if he finds that such disposal would not be detrimental to the public interest. Thus, the bill would not interfere with or impair the operation of the mining laws or of the Taylor Grazing Acts (48 Stat. 1269; 43 U. S. C., sec. 315), as amended.

The materials and resources subject to the bill would be disposed of for an adequate price after ample public notice. Where the appraised value of the material or resource exceeds $1,000, it would be disposed of only to the highest responsible qualified bidder by competitive bidding and after publication in a newspaper of general circulation in the county in which it is located. Where the appraised value is $1,000 or less, it would be disposed of upon such notice and in such manner as the Secretary may prescribe.

The proposed bill would extend the policy of the temporary act to public lands which have been withdrawn in aid of a function of a Federal department or agency other than the Department of the Interior, or of a State, Territory, or local governmental unit. In

such cases, the Secretary could make disposals under the bill only with the consent of such department, agency, or unit. Instances have arisen where persons have desired the natural products on such withdrawn lands and where there was no objection to the sale, but where no sale could be made because the temporary act reached only lands under the "exclusive jurisdiction" of the Secretary of the Interior.

The bill would also eliminate the $10,000 limit on a single sale contained in the temporary legislation. It is anomalous to require competitive bidding and to have a dollar limit on sales. The estimated value of the resource offered must necessarily be considerably below $10,000 in order to allow for the bidding process. Furthermore the bidders have no reason to bid over $10,000, no matter what their bid would have been in a free market.

The limit has other disadvantages. For example, in the case of timber on public lands which are not suitably located for inclusion in a sustained-yield, cooperative agreement under the act of March 29, 1944 (58 Stat. 132; 16 U. S. C., sec. 583), the value of timber in an area suitable for the activities of only one purchaser may be several times $10,000. This limitation prevents the most advantageous disposal of timber in such area. In order for the Government to receive the maximum stumpage value and to obtain maximum productivity through prudent forest management, timber should be sold on the basis of natural logging units which may often contain timber worth more than

$10,000. The limitation, therefore, encourages the cutting of only the most desirable and accessible timber in such unit and the leaving of other timber which frequently should be cut to prevent its deterioration. Furthermore, a timber operator incurs certain expenses for logging roads, equipment, structures, and other improvements which must be amortized during the life of the operation. If a sufficiently large block of timber is not made available in one sale to warrant such necessary expenditures, ordinarily no sale will be consummated. If an operator should submit a bid it would be very low because not being assured of additional supplies of timber in the same area, the entire cost of physical improvements would likely be charged against his small timber allotment. It is also significant to note that all other commercial timber under Federal administration in the United States and Alaska can be sold without a limitation of this kind.

There are on the public lands many materials and resources which can be used profitably for the benefit of local industries and communities and to the disposition of which there is no real objection. There is, however, no permanent legislation under which these may be utilized. The Congress took cognizance of this when it passed the temporary act of September 27, 1944, supra. Since that act has expired there is no statutory authority to dispose of these useful materials.

Included in the materials to which it is contemplated the proposed bill would apply are:

1. Timber and other forest products which are not susceptible of management under a sustained-yield program under the act of March 29, 1944, supra, but which may be disposed of in a manner not harmful to the public interest. Important forest products include turpentine and other derivatives of resin, medicinals, aromatics, tannin, and dyes.

2. Sand, stone, and gravel not of such quality and quantity as to be subject to the mining laws but which are desired by local governments, railroads, local industries, ranchers, and farmers for the construction and maintenance of highways, secondary roads, railroads, structures of various kinds, and farm and ranch improvements.

3. Yucca, manzanita, mesquite, cactus, and other desert and mountain vegetation which provides such products as disinfectants and medicinal compounds, soap, food, splints, rope, twine, burlap, baskets, novelties, ornaments, insecticides, and alcohol.

4. Common earth to be used for road fills, earth dams, stock-watering reservoirs, and similar uses.

5. Clay to be used for the manufacture of bricks, tile, pottery, and similar products.

Among the resources listed above, timber and forest products are by far the most important. There still remains under the jurisdiction of the Department of the Interior as scattered tracts or areas outside of existing reservations and outside of the revested Oregon & California grant lands an estimated 3½ to

5 million acres of commercially productive public-domain forest land with an estimated volume of at least 6 billion feet of merchantable saw-timber, valued at 20-25 million dollars. Woodlands comprise a very much larger area and contribute substantially to meeting the needs of local people for poles, fence posts, fuel wood, and similar products. With the expiration of the temporary act, the Department now has no statutory authority to sell this public-domain green timber other than under a sustained-yield agreement under the act of March 29, 1944, supra.

An increasing number of applications have been received for the purchase of this public-domain timber. At this time 56 applications are on file for timber in amounts varying in value from several hundred dollars to $50,000 or more. It may be reasonably assumed that a number of persons did not file applications because of the $10,000 limitation or because of the temporary nature of the act.

The timber and other forest products on these lands are a renewable resource. Since timber lessens in value each year following maturity, it should be removed at the time it has its greatest value. This Department, as a long-time advocate of conservation and wise land use, is pledged to maintain these forest and wood lands in a state of good productivity. In order to secure the maximum annual growth and thereby obtain such productivity, it is necessary to remove the mature trees, to make cuttings to prevent stands from becoming stagnated, and to employ other established

forest-management practices. These things cannot be accomplished without authority to sell the timber which would be cut under such management practices.

The present shortage of lumber, poles, ties, mine timbers, and other forest products is another impelling reason for disposing of merchantable timber on the public domain in a manner that will benefit the growth and yield of forest stands. Revenues to the Federal Treasury resulting from the proposed legislation would not be insignificant.

This bill would not displace present laws authorizing the disposal of public-land resources, nor would it provide an alternative method of disposal since it would apply "only if the disposal of such materials or resources * * * is not otherwise expressly authorized by law, including the United States mining laws." National forests are specifically excluded from its operation.

The Bureau of the Budget has advised me that there is no objection to the presentation of this proposed legislation to the Congress.

Sincerely yours,

Oscar I. Chapman,
Under Secretary of the Interior.

A BILL To provide for the disposal of materials or resources on the public lands of the United States

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Interior, under such rules and regulations as he may prescribe, may dispose of materials or resources, including sand, stone, gravel, vegetation, and timber or other forest products, on public lands of the United States if the disposal of such materials or resources (1) is not otherwise expressly authorized by law, including the United States mining laws, (2) is not expressly prohibited by laws of the United States, and (3) would not be detrimental to the public interest. Such materials and resources may be disposed of only in accordance with the provisions of this Act and upon the payment of adequate compensation therefor, to be determined by the Secretary. Where the lands have been withdrawn in aid of a function of a Federal Department or agency other than the Department of the Interior or of a State, Territory, county, municipality, water district, or other local governmental subdivision or agency, the Secretary of the Interior may make disposals under this Act only with the consent of such Federal Department or agency or of such State, Territory, or local governmental unit. Nothing in this Act shall be construed to apply to lands in any national forest, national park, or national monument or to any Indian lands or lands set aside or held for the use or benefit of Indians, including lands

over which jurisdiction has been transferred to the Department of the Interior by Executive order for the use of Indians.

Sec. 2. Where the appraised value of the material or resource exceeds $1,000, it shall be disposed of by the Secretary to the highest responsible qualified bidder by competitive bidding and publication of notice of the proposed disposal in a newspaper of general circulation in the county in which the material or resource is located. Such notice shall be published for as many times and for such period as the Secretary may prescribe. Where the appraised value of the material or resource is $1,000 or less, it may be disposed of by the Secretary upon such notice and in such manner as he may prescribe.

Sec. 3. All moneys received from the disposal of materials or resources under this Act shall be disposed of in the same manner as moneys received from the sale of public lands.